No. 3749

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

W. E. GERBER, JR., and ANGLO-CALIFORNIA TRUST COMPANY (a corporation),

Appellants,

vs.

RICHARD J. SPENCER, C. V. MILLER, R. H. COUNCILL, TIM HARRIGAN, FRANKLIN ADREAN, JR., FRANK GARLOCK, BIRGER JOHANSEN, FRITZ SHILLING, AXEL JOHNSSON, JOHN LAHTIMEN, WILLIAM H. CRAWFORD, J. B. HUGHES, WALTER S. AUSTIN, LEON A. CARTER, CAMPBELL A. HOBSON, W. OWENS, W. C. WARD, N. E. AUSTIN, CHARLES V. SMITH, H. D. WRIGHT, ROBERT DOUGLE, JOHN LOPEZ, WILLIAM OVID, S. J. WRIGHT, G. GARFIELD, and D. W. DAVIS,

Appellees.

BRIEF FOR APPELLEES.

IRA S. LILLICK,
Proctor for Appellees.

J. ARTHUR OLSON,
Of Counsel.

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BRIEF FOR APPELLEES.

Appellant's statement of the facts, where he has stated those facts correctly, is so incomplete that to properly understand the issues submitted to the lower court, it almost necessitates reading through

the long record in the apostles. Appellant omits mention of the following salient facts:

The testimony of the master shows that the vessel put into the port of San Francisco in distress on February 28th, 1920, and that while the vessel was in the harbor of San Francisco arrangements were made for discharging her cargo at California City, on San Francisco Bay, instead of discharging her at Bremerton, Puget Sound, as originally contemplated under the contract of affreightment (apostles p. 65).

The testimony of the master further shows that four days before the vessel arrived at the port of San Francisco, she was short of provisions. Certain emergency stores were on board, and on two occasions, after the vessel had arrived in the harbor of San Francisco Bay, Mr. Moran, the port steward of the Pacific Motorship Company, the original claimant of the motorship "Benowa" herein, sent out consignments of provisions. These provisions lasted only until March 9th, 1921, upon and after which date, the master and crew in a strange port where they were without friends were thrown on their own resources and it was necessary for them to shift for themselves (apostles p. 65).

Repeated demands upon the Pacific Motorship Company to furnish them with food and supplies were unavailing. On March 9th, the captain applied to Mr. Ringwood, the president of the

Pacific Motorship Company, for supplies and provisions for the crew and he was referred to Mr. Moran, the port steward. The master informed Mr. Ringwood that he had already talked to Mr. Moran and Mr. Ringwood replied—"Well, don't talk to me any more. I do not want to see you around the office". Upon going to Mr. Moran again, the master was advised by him that he could do nothing for the crew. Prior to this particular conversation with Mr. Ringwood, the master had demanded from him money with which to pay the crew the one-half of their wages then due which they were entitled to receive upon arrival in a port of voyage. This demand was also refused. Upon this refusal, the master and certain members and representatives of the crew applied to Mr. Walter McArthur, the United States Shipping Commissioner at the port of San Francisco for aid. The Shipping Commissioner, telephoned to the office of the Pacific Motorship Company and asked for Mr. Ringwood. Mr. Ringwood apparently did not wish to talk to the Shipping Commissioner, and referred him to Mr. Moran, who, at the request of the Shipping Commissioner, called at his office (apostles p. 193, 194). There, Mr. Moran was asked if he could supply the crew with provisions at once and he replied that he could not because the company could not secure credit and that they did not have any money in the treasury. Upon the company's refusal to either supply provisions or arrange for credit for provisions, the master and

crew, with the aid of their proctor, made arrangements with J. & R. Wilson & Co., wholesale grocers, for supplies. It was agreed that the supplies should be paid for out of the allowance for subsistence the men expected to recover through this proceeding. At the time of making the demand for subsistence and wages, demand was also made for transportation in accordance with the provisions of the shipping articles. When the master made these various demands at the office of the Pacific Motorship Company, he was always referred to the port steward, or the auditor, and no attempt of any kind, so far as the officers and/or the crew have been advised, was made by the officers of the company or any one in its behalf to furnish credit or provisions to the crew. The record is absolutely lacking in any showing that attempts were made by the Pacific Motorship Company or anyone else in privity with it either to raise money to pay the crew or to provide them with food. We have only the testimony adduced by the appellants that they were without funds and had no credit. They might not have had credit for money to be used for other purposes but with the security they had of the first lien upon the vessel obtainable possibly through the use of the money for the specific purpose of caring for this crew how could appellants have known until they or their predecessors tried what could be done?

On page 4 of brief for appellants, counsel states that Pacific Motorship Company assigned to libelant's proctor, as trustee, $12,000 to meet the

claims of libelants and telegraphed to Washington directions to pay this sum to libelant's proctor who, at the same time, telegraphed his acceptance of the assignment. This statement is clearly misleading and apparently an attempt to have this court believe that the Pacific Motorship Company voluntarily took steps to obtain money with which to pay the wages due the crew. The record clearly shows that on March 16, 1921, proctor for appellees telegraphed the Navy Disbursing office to withhold from payment the freight monies due upon the cargo of coal carried by the motorship "Benowa" and thereafter, on the next day, when the Pacific Motorship Company ascertained that apparently the payment of this freight money would be withheld, telegraphed on in an endeavor to obtain its release. Thereupon the telegram of March 17th, 1921 (apostles p. 476) was sent to Edwin H. Duff. Notwithstanding the absolutely unjustifiable insult of counsel for appellants in charging counsel for appellees with delay in the proceedings of this case so that any judgment obtainable might be enhanced by reason of a possible penalty because of the nonpayment of wages, it clearly appears from the record that as early as March 17th, 1921, counsel took every possible step to secure the wages due the officers and the crew, and on account of their dire needs attempted to provide them with necessaries for themselves and families by endeavoring to arrange so that the wages might be paid to them from the freight mon-

ies due from the United States Navy department. No assignment whatever was made of any freight monies and the statement made by W. L. Comyn is only a conclusion upon his part and there is no evidence in the record to show that an assignment was made or that an acceptance of any assignment was given by proctor for appellees. Had the assignment been made, as counsel would have this court believe, it would have been introduced in evidence, and would have been a part of the record.

Counsel, on page 7 of their brief, state that the clerk has omitted the decision of Judge Neterer from the apostles. The decision which counsel refers to was expunged from the record by reason of the fact that Judge Neterer, in writing it apparently had the old statutes before him covering the non-payment of wages providing that seamen are entitled to a sum equal to one day's pay for each day that payment of wages are withheld, whereas now the statute provides for a sum equal to two day's pay for each and every day payment is withheld. In the later decision the last two lines are:

> "This decision is to supersede that filed on May 14, 1921, which is hereby expunged from the record" (apostles p. 228).

The quotations on page 7 of counsel's brief and the appendix to their brief are not a part of the record. The clerk properly omitted the opinion as the court had ordered it expunged. The decision of Judge Neterer was referred to by him as a supplemental decision, but this was a misnomer on his

part, for the reason that it is the only decision in the case, the former one having been expunged from the record.

Counsel for appellant state that on May 17th, 1921, the day upon which the decision was filed, it was agreed between counsel and Judge Neterer that no penalty should be imposed for any delay subsequent to that day. Feeling, as we do, that a controversy between counsel as to what the facts are should have no weight with this court, still we cannot leave such a statement unchallenged when it is not in accord with the facts. Upon the evening of the day the decision was filed, Judge Neterer was leaving for Seattle. Counsel could not agree upon the form of the decree, and it was suggested by the court that possibly counsel would waive the penalty for any date beyond May 17th, 1921, providing that the amount of money then in the registry of the court, and which had been deposited therein by the substitute claimants herein, be paid to the officers and the crew without prejudice to any rights which they might have under the decree. Counsel could not stipulate away any rights which the appellees herein might have under the decree and it was for the court to say whether or not the penalty should stop upon the date of the decree, or whether it should continue until the wages were paid.

We will take up the arguments in appellants' brief in the same order in which they there appear. Counsel claim that when they made their tender

of the wages due to March 17th, 1921, under date of April 27th, 1921, that the penalty provided by the statute should then stop. The decisions clearly hold that this so-called penalty is a liquidated amount which is to cover the wages which the seamen earn and a sum sufficient to pay their expenses. The reason for the rule being that seamen might by necessity feel compelled to compromise valid claims for amounts for wages rightfully due them when they were in a foreign port or many miles from home. This two days' pay for one is not in fact a penalty, but only an allowance for expenses in addition to the wages they should receive during the period which they are forced to remain idle while seeking other employment, or while being forced to wait until their just demands are satisfied. Had the crew accepted the tender made by the appellants, they would have been without any remedy for the time they had lost from March 17th to April 27th, which is a period of forty days. During all of this period these men in a city where they were unknown had been providing their own provisions with credit which they had obtained without any assistance whatever from the owners of the motorship "Benowa". Counsel has cited no authority to substantiate their claim in this regard and we submit that this argument is unsound. To uphold this contention would be to disregard the very purposes for which the statute was enacted. This court in the recent case of *Vincent et al v. United States et al*, 272 Fed. 889, disposed of this question.

Section 4529 of the Revised Statutes of the United States, among other things provide that,

> "Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned, without sufficient cause, shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court."

This clearly shows that the tender made by appellants was not sufficient. The amount due the men was their wages up to and including March 17th, 1921, and a sum equal to two days' pay for one from said March 17th up to and including the date of tender. Counsel then try to shift the responsibility for the delay in payment after April 27th, to the refusal of the appellants to accept the amount of wages, together with transportation, etc., provided in the Articles which they should have received on March 17th. We feel confident that this court will not support the contention that the tender that was made on April 27th, 1921, was in an amount that freed appellants from further liability of Sections 4529 or 4530 of the Revised Statutes of the United States.

Counsel further argue that the penalty under the provisions is imposed by the statute for the refusal to pay wages and not for the refusal to meet all demands which seamen may see fit to make. The answer to this contention is clearly made in an opinion written by Judge Choate, in the case of

Covert v. British Brig "Wexford", 3 Fed. Rep. 577, where, after commenting on the English statutes, which are similar to the ones here in question, the court said:

> "We have a similar provision in our own Act. These statutes are designed for the protection of seamen to prevent the abuse of withholding their pay and thereby keeping them in port at expense and out of employment while waiting for settlement. It is a liquidation of indemnity for such enforced expense and delay."

Here, again, counsel for appellants attempt to make this court believe that demands were made by the appellees which were disallowed by the lower court. The schedule attached to the libel includes an amount sufficient to cover transportation, and subsistence during the transportation, and from those amounts are deducted: (1) such amounts as may have been advanced to any of the members of the crew and (2) amounts charged against the accounts of the men for supplies from the slop chest of the vessel.

We assert, without fear of contradiction, that the wages demanded by the crew upon their arrival, were the wages due them under the shipping articles. The schedule attached to the libel lists the claim of each libelant and includes the wages due, transportation, and subsistence during time of transportation. The decree provides for the amount of wages less any credits charged against the libelants, with transportation and subsistence as a sep-

arate item. This accounts for the apparent discrepancy which counsel have pointed out and in trying to make the most of it referred to in numerous occasions in their brief. This palpable attempt to make this court believe that the payment of the wages was not made because there was a dispute as to the amount that was due the officers and the crew, will, we are sure, be unsuccessful.

It also appears from the record that it was stipulated that no payment of wages had been made to any of the officers or members of the crew for services performed under the shipping articles, save and except that there were certain advances made to some of the crew (apostles p. 61). Counsel cannot point to any part of the record where any question was made as to the amount the libelants were entitled to receive from the Pacific Motorship Company when they made their demands for the wages due them. There is not a scintilla of evidence in the record that the amounts demanded by the men were not due them. We cannot but feel that counsels' discussion of the point in their brief is a wilful attempt to confuse the facts and mislead the court.

Counsel argue that no penalty should be imposed for any period subsequent to March 26th, 1921, the date of the appointment of the receiver. This argument is answered by the finding of Judge Neterer in his opinion:

> "The fact that a receiver was appointed for the claimant cannot shift the burden for non-

> payment from the ship to the wage earner, especially where the ship was already in the custody of the admiralty court. I know of no case, and none has been called to my attention where a contrary rule has been announced in this or any other District upon a like state of facts."

The appointment of the receiver did not prevent application being made to the court to relieve the situation in which the officers and crew of this vessel found themselves. The receiver could have taken such steps as were necessary to conserve the assets of the Pacific Motorship Company, but the testimony shows that he did nothing to assist the libelants in the position in which they found themselves. In his testimony (apostles page 94) in answer to the question:

> "What did you do with respect to the motorship 'Benowa', upon qualifying as such Receiver? Answer: The only action that was taken was to address a letter to the master of the ship enclosing a notice to the crew advising them that the 'Benowa' was in my hands as the Receiver, and notifying them that their services were no longer required and they were notified to get off the ship."

This is the kind of treatment which the crew received from the time the vessel first arrived at San Francisco. By their attention to their duties and performing the services which they had agreed to perform, and after bringing the "Benowa" safely into port in San Francisco, the Pacific Motorship Company and the gentlemen interested therein ap-

parently expected them to take to the streets without a cent in their pockets and with no provision whatever for their return to the port from which they had shipped. Nothing whatever was done for them, although everything possible seems to have been done by the Pacific Motorship Company, or those in charge of its property to protect and conserve that property. No expense has apparently been spared to conserve its assets. If the Pacific Motorship Company had attempted through the receiver to do something to relieve the situation it could have obtained aid for the men. It did not do so. Counsel argues that no penalty should be imposed because of the financial condition of the Pacific Motorship Company. He argues that the burden of the responsibility for the non-payment of these wages should fall upon the seamen rather than the owner of the vessel, or upon any one else who might be interested in the venture by reason of equitable or other claims. This burden could not fall upon any of the other lien claimants, for the reason that the appellants have filed a supersedeas bond covering the amount awarded in the decree herein (apostles 418-422). The intent of the framers of the statutes providing for increase of wages in cases of this character was to compel owners of vessels to take the necessary steps to be prepared to pay the wages provided for in the shipping articles. Had the owners of the Motorship "Benowa" in this case taken the necessary preliminary steps to insure the governments withhold-

ing such amount as might have been required to pay the wages to become due, out of the freight monies, it could have done so. From the facts as they appear in the record, the Pacific Motorship Company must have known of its financial condition for some time prior to the arrival of the motorship "Benowa" at San Francisco.

Appellants claim that libelants commenced their proceedings for the collection of the wages before payment of these wages was due. The record shows that the vessel arrived in San Francisco on February 28th, 1921. The voyage ended here. Demand was then made for one-half of the wages then due, and continuously made thereafter (apostles pp. 119, 168, 169).

These undisputed facts bring the case clearly within the provisions of the following sections of the Revised Statutes:

Sec. 4529:

> "The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens, and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every

master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court; but this section shall not apply to masters or owners of any vessel the seamen of which are entitled to share in the profits of the cruise or voyage."

Sec. 4530:

"Every seaman on a vessel of the United States shall be entitled to receive on demand from the master of the vessel to which he belongs one-half part of the wages which he shall have then earned at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended and all stipulations in the contract to the contrary shall be void; Provided, Such a demand shall not be made before the expiration of, nor oftener than once in five days. Any failure on the part of the master to comply with this demand shall release the seaman from his contract and he shall be entitled to full payment of wages earned. And when the voyage is ended every such seaman shall be entitled to the remainder of the wages which shall then be due him, as provided in section forty-five hundred and twenty-nine of the Revised Statutes; Provided further, That notwithstanding any release signed by any seaman under section forty-five hundred and fifty-two of the Revised Statutes any court having jurisdiction may upon good cause shown set aside such release and take such action as justice shall require; And provided further, That this section shall apply to seamen on foreign vessels while in harbors

> of the United States, and the courts of the United States shall be open to such seamen for its enforcement."

In *Burns v. Fred L. Davis Co.,* 271 Fed. at p. 444 seamen's wages were withheld because an attachment issuing out of the state court was served upon the owner of the vessel attaching those wages. No state statute, (even had such a statute any binding force in view of sec. 12 of the Revised Statute (38 Stat. at Large, s. 153, p. 1169 [comp. st. § 8325a] forbidding the attachment of wages due a sailor) of Massachusetts permitted such an attachment and the court said:

> "The remaining question under Section 3 of the Act of 1915 is whether the libelee in withholding the wages acted without sufficient cause. He says that he was justified in declining to pay the wages for the reason that he was in duty bound to recognize the authority of the process of the District Court. If his position is right in this respect, then the provisions of the Federal law enacted for the benefit of seamen and in the exercise of its maritime power may at any time be set at naught by a state process and its provisions rendered valueless. * * * Under the circumstances we think the conclusion should be that the libelee withheld the wages without sufficient cause and that the libelant should recover the additional pay contemplated by the statute and his costs."

In the *Chas. L. Baylis,* 25 Fed. Rep. p. 862, Judge Brown commenting on the extra pay provided by the statute, said:

> "But the extra pay provided by the statute is an incident to their claim of wages proper and ranks with their wages as a prior lien."

Appellants have cited numerous cases to uphold their contention that this increase of wages is a penalty. We submit that the authorities generally show conclusively that this is intended as liquidated damages to cover the expenses and losses which are forced upon seamen without any fault or neglect on their part.

Appellants in citing the case of the *General McPherson* in 100 Fed. Rep. 860-864, quote a portion of one sentence in the opinion but do not state the facts or enough of the opinion to correctly express the holding of the court. Reading the portion quoted would lead one to believe that the case holds that inability to command the money necessary to pay off a crew is sufficient cause to relieve an owner from liability. Such is not the opinion of the court. In that case the owner of the vessel went to heavy expense to bring the vessel within the reach of judicial process of all the claimants having any liens against the vessel. The libelant had also joined the vessel when he himself was far away from home and desirous of going to his home town where, after he had been discharged, he had, in the meantime, sought and obtained other employment and had been earning wages in that other employment. In this case, no such equitable facts appear. On the contrary, the men were brought from Baltimore on the Atlantic Coast to the Pacific Coast and left stranded without any means of support. They did not even receive the assistance of the owners of the vessel in obtaining credit or subsistence

of any kind. They were absolutely ignored. Worse than ignored. Mr. Ringwood, the president, when the master called upon him for aid for his crew said: "Well, don't talk to me any more, I don't want to see you around the office"(apostles p. 64, 65.)

The paragraph containing the essential facts and findings of the court in the *General McPherson* and from which appellants have quoted a portion of one sentence, is:

> "1. As to the claim of the libelant Graham of a right to recover wages after he was discharged from the vessel until the time of final payment, there is a serious question in my mind whether the statute authorizing such recovery is to be regarded as a penal statute, to be given a strict consideration, which would require a seaman to enforce the penalty by a suit in personam against the master or owner. The statute requires the master or owner to pay a sum equal to one day's wages for each day's delay, but it does not in specific terms subject the vessel to a lien for this penalty, nor authorize its collection by a suit in rem. However, this question has not been argued before me, and I do not at this time intend to decide it. A seaman is only entitled to recover this additional pay when his wages shall have been withheld without sufficient cause, and I hold that, in view of the heavy losses sustained by the owners in recovering possession of their vessel and bringing her within reach of judicial process, so that all having claims against her might be protected, their inability to command the money necessary to pay off the crew is sufficient cause to relieve them from liability under this statute. The $1000 which Mr. Phil-

> lips possessed would have been almost entirely absorbed if it had been devoted to paying the crew of the vessel, and I consider that he was justified in keeping that amount of money for other uses. Mr. Graham joined the vessel when she was in the far north, and presumably he was anxious to come to Seattle, where his home is. After leaving her, and while this suit has been pending, he has been earning wages in other employment. Under all these circumstances, I consider that it would be an injustice to allow him any amount in addition to what he has already received."

The case of the *Wenonah,* Fed. case No. 17412, cited by counsel, does not uphold the contention asserted in the brief. The court in that case held that, where a vessel was wrecked and sold in a foreign port under the statutes which were then in existence and referred to in said case, the owners were not put under the obligation of sending an additional amount of money, over and above the amount realized from the sale of the vessel, to satisfy a decree for the increased wages provided for therein. Neither the facts nor the law in that case are pertinent to the questions involved herein.

The appointment of a receiver for the Pacific Motorship Company did not divest the admiralty court from jurisdiction over the motorship "Benowa"; it having obtained jurisdiction thereof prior to the appointment of the receiver.

In the case of *The Philomena,* 200 Fed. 859, a petition in bankruptcy was filed by the owner of the vessel September 14, 1911, and a receiver was ap-

pointed October 7, 1911. On September 9, 1911 a libel in admiralty was filed for repairs and supplies furnished to the vessel and the vessel was arrested on that day. On October 11, the receiver filed a claim to the vessel and asked that the possession of the vessel, or its proceeds, be delivered to him. The court, after noting that admiralty courts have exclusive jurisdiction for the enforcement of maritime liens, says:

> "But it is settled that the admiralty courts have exclusive jurisdiction over maritime liens, and that as other courts are without power to establish and enforce such liens, so they are without power to displace them. Moran v. Sturges, 154 U. S. 263, 14 Sup. Ct. 1019, 38 L. Ed. 981; Paxson v. Cunningham, 63 Fed. 132, 11 C. C. A. 111; Hudson v. New York, etc., Co., 180 Fed. 973, 104 C. C. A. 129. It was said in Paxson v. Cunningham that an 'admiralty court has peculiar rules of its own in some respects, which cannot be conveniently, if at all, applied by a court of equity or common law.' 63 Fed. 134, 11 C. C. A. 113. It may well be that under the present Bankruptcy Act a bankruptcy court would encounter less difficulty in this respect than a court of equity or common law; but the fact remains that no admiralty jurisdiction has been given to courts of bankruptcy. Their powers over the bankrupt's property, once their jurisdiction has attached, and their power to determine questions regarding liens thereon, however strongly these may be stated (see Carter v. Hobbs (D. C.) 92 Fed. 594, Staunton v. Wooden, 179 Fed. 61, 63, 102 C. C. A. 355, and cases there cited), do not go to that extent. The admiralty court, therefore, cannot refuse to proceed, in an admiralty suit properly before it, wherein its jurisdiction

over the property was complete before the bankruptcy proceedings were inaugurated; nor can it require the libelant, in order to get his lien established, to present and prosecute his claim in proceedings which, though also before it, are not proceedings wherein admiralty jurisdiction can be exercised. A materialman in such a suit is not to be regarded as prosecuting a claim provable in bankruptcy, but as asserting a right in the vessel libeled, irrespective of her ownership. He has the right in an admiralty court to be so regarded, and it is a right of which the court cannot deprive him. That his libel is filed within four months prior to the bankruptcy petition can in no event affect the question, because he does not obtain his lien by filing his libel, but seeks thereby to establish a pre-existing right.

To grant the receiver's application would be to make the proceeds of this vessel's sale, which now constitute the fund from which maritime liens upon her are to be paid in the order of their priority under the maritime law, chargeable, before applying any of them to the satisfaction of such liens, with a share of the expense of administering the estate in bankruptcy. If this might properly be done when admiralty proceedings are had by consent of a bankruptcy court after its jurisdiction over the property has attached, as in Re Hughes (D. C.) 170 Fed. 809, I do not think it can be done with justice to the lien claimants when the admiralty court has acquired jurisdiction first, and it cannot be said that the entire vessel constitutes part of the estate which is to be administered in bankruptcy. Under such circumstances it seems to me that the bankruptcy court cannot administer, nor its trustee take title to, anything more than the bankrupt's interest in the vessel, which will be only so much of her or her proceeds as may be left after the maritime liens are satisfied."

The Pacific Motorship Company introduced evidence to the effect that the Commonwealth of Australia had a mortgage upon this vessel. Of what materiality is it to the crew that the Commonwealth of Australia had a financial interest at stake in the vessels of this company? A mortgage upon a vessel, unless executed under the terms of the Jones Act does not even give to the mortgagee an admiralty lien upon the vessel.

It is the duty of a company operating a vessel, when it sends a crew upon a voyage, to provide for funds to meet the payment of the wages due them. The terms of the Shipping Act quoted herein are clear and unmistakable in their meaning. So careful was Congress to protect the rights of seamen in this regard, that the provisions were so drafted as to entitle the crew to receive two days' pay for one for each day that their wages should be unjustly withheld from them.

These provisions of the Revised Statutes of the United States have been uniformly followed and upheld.

The case of *Pacific Mail S. S. Co. v. Schmidt,* 241 U. S. 92, originated in this district. It was decided by Judge M. T. Dooling and his opinion appears in 209 Fed. at page 264—This court affirmed that decision.

So much stress has been laid upon the receivership proceedings that we deem it necessary to again refer to this subject. The claim of the Common-

wealth of Australia, the plaintiff in the suit in which the receiver was appointed, is inferior to that of the libelants in this case. This vessel arrived at the port of San Francisco on the 28th day of February, 1921. Continual demands from that time on were made for one-half of the wages due the libelants within twenty-four hours after its arrival, and subsequent demands were made upon the master and owners of the vessel (apostles pp. 119, 168, 169). The complaint of the Commonwealth of Australia against the Pacific Motorship Company was filed on the 7th day of March, 1921, and the receiver was appointed thereafter on March 26th, and qualified on March 28th. There is no showing whatever that funds could not be raised to pay the crew, but, on the other hand, it is clearly shown that prior to anything whatever being done or attempted to be done for the crew, the claim of the Commonwealth of Australia for $1,625,000. was purchased and there can be no question but that this was done in behalf of the owners or some person or firm interested in the company. Where a claim of this amount has been purchased, even though we have no testimony as to the amount of the consideration, and later the purchaser makes an offer of $5609.20 to this crew, and accompanies that offer with an actual payment of the amount into court can there be any doubt but that sufficient funds to pay this crew could have been obtained when demand was made, if the owners had in good faith sought to secure it? It seems to us that the

only argument that our opponents can use is that they have brought themselves within the terms of the Statute as to "sufficient cause" by attempting to make this court believe that they had no money to pay this crew, and could not raise any. The fact is that the sole effort, as we see the situation, was directed toward extricating the vessels from the difficulty brought about by the application for a receiver, and the condition of the crew was ignored. A reading of the record here will lead anyone to the conclusion that Mr. Gerber, the "volunteer" who has purchased the claim of the Commonwealth of Australia, who has made the tender of $5609.20, is but the mouthpiece of the owners of this vessel, or moneyed interests brought into the matter through the influence of Mr. Comyn, or the Pacific Motorship Company. We need but point to the fact that the same attorney representing Mr. Gerber apparently represented Mr. Comyn. On the other hand, the crew remained with the vessel and protected it and took care of it in every possible manner. The very purpose of the Statute providing that the crew shall be paid immediately when their wages or any portion become due, is to prevent their being forced into a compromising position on account of the financial difficulties which they might find themselves in when stranded in a port away from home. Until we had seen counsel's brief in this court, no question had been raised in reference to the amount of wages due the seamen, nor had there been at any time any con-

troversy over their being entitled to their wages, but because of other persons or firms having inferior liens and asserting their claims, the owners of the vessel are seeking to depend upon this as a justifiable excuse for refusing payment of the wages to the crew. It was well known to the owners of the vessel, and would have been to anyone holding a mortgage upon the vessel, that in the event of the sale of the vessel, the claim of the seamen would be paid first, and had there been any reasonable effort whatever by the owners of the vessel to obtain funds for the payment of the crew, we submit that that could have been accomplished.

In the case of the *Cubadist,* 252 Fed. 662, the court says:

> "What, then, is meant by the words, 'without sufficient cause'? There are numerous instances where masters have been known to wilfully refuse to pay seamen their wages. In these cases I think it unquestionable that if the seaman recovers he should also recover double pay. There are, however, other cases where the master may have just cause to doubt whether the seaman is entitled to demand his pay, or cases where it may be a very close question. I do not think that the Statute was intended to penalize any master or vessel for exercising sound judgment and discretion or to require them to surrender such judgment under a penalty of double pay. I think the language used carries with it the idea that where the court finds that the master's refusal was wilful and without justification or excuse, double pay should be given, but where the master was exercising a reasonable and proper discretion and the question was doubtful, it reserves to the

court the power to pass upon the question of the reasonableness or the sufficiency of the excuse of the master and give or deny the double pay accordingly as the court may find the contention of the master to be honest or a mere pretext."

In the same opinion on page 663, the court says:

"I have gone more into detail in discussing the various contentions made as to the proper construction of these two sections because neither I nor the proctors in this case have been able to find any construction by other courts of these statutes in this respect, although these proctors have searched diligently for such construction. I have given the conclusions I reached and the reasons which prompted me to reach them, hoping that other judges, as the questions may arise before them, will criticize and correct or amplify them as their experience and judgment may indicate."

In the case of the *City of Montgomery,* 210 Fed. at pages 675 and 676, Judge Meyer, in his opinion, states:

"It is claimed that the provisions of this statute may be waived. and in support of this view claimant cites The Lillian, (D. C.) 131 Fed. 375, and The Joseph B. Thomas, (D. C.) 136 Fed. 693, and Id. (C. C. A.) 148 Fed. 762. I think these cases are distinguishable from that at bar, but, in any event, I am of opinion that the master and seaman can not, by contract, abrogate the provisions of section 4529. Without enlarging on the history of legislation of this character, it may be said that Congress has long regarded seamen in the nature of wards whose rights must be safeguarded. The requirement to pay them promptly is not to be

overridden. If, in the practical conduct of a responsible steamship company, such a provision is found inconvenient or otherwise unsatisfactory, the remedy is by appeal to the legislative body, but the courts must construe such a statute, not merely by its letter, but in sympathy with the legislative intent.

It is true that the statute does not in terms declare void an agreement in contravention thereof, but, in speaking of the termination of 'the agreement' it is clear that Congress had in mind that no matter what 'the agreement' was, the seaman's wages must be paid within two days after the man had duly performed the service required by 'the agreement'. Holding this view, I am of opinion that the statute is controlling and that the provision in the articles here discussed was void and of no effect. * * *

To hold that an owner or master may escape the penalty prescribed in the very statute which he seeks to avoid is to strip the statute of the precise purpose for which in that particular, it was enacted. However, debatable a question arising under a statute may be, it is no excuse that one has made an honest error in the interpretation of that statute."

The general interpretation of the statute in question is that the seamen are entitled to be compensated for delay in payment to them of the wages which they have honestly earned and where there is no reasonable ground for controversy with respect to their right to wages, they are entitled to two days' pay for each day that such sum due them is withheld. This is clearly indicated by District Judge Hanford, as stated in his opinion in the case of the *Amazon,* 144 Fed. 155.

The case of *Covert v. British Brig "Wexford"*, 3 Fed. 577, is a case in which the seamen libeled this vessel at the port of New York and is one in which there were various claims against the vessel. The vessel was sold under a decree of the court, and the proceeds, amounting to $2075., were paid into the registry of the court. Various parties appeared claiming liens on the vessel for materials and supplies. The amounts due them had not been adjusted but the fund in court was insufficient to pay in full the seamen, the master and these other parties, if their claims should be established. A mortgagee also appeared as claimant of the surplus proceeds of the vessel. The amount due the seamen for wages and extra pay was not contested, but it was objected, on behalf of the mortgagee and other parties who presented claims, that the seamen had no lien for their extra pay. Judge Choate in his opinion stated:

> "I think the extra pay due to the seamen is to be treated as wages for which they have a prior lien on the vessel. The statute provides that it shall be recoverable as wages. This clearly means by the same method or mode of procedure. The customary mode of recovering wages is by libeling the ship. The language therefore necessarily implies that the ship is holden for this extra pay, and aside from this particular language of the statute, I think that from the nature of the provision and the purpose it was intended to serve, the extra pay may be properly regarded as an addition or increase of wages in the event of the neglect of the master or owner to provide for their prompt payment. We have a similar provision

> in our own act. These statutes are designed for the protection of seamen to prevent the abuse of withholding their pay and thereby keeping them in port at expense and out of employment while waiting for a settlement. It is a liquidation of indemnity for such enforced expense and delay."

It is unreasonable to believe that any court would permit American seamen to be deprived of their just wages for a period of over one month and force them to obtain their own subsistence while the Pacific Motorship Company is settling a claim inferior in rank to that of libelants, and then permit them to say, "We will pay you so much money —you can leave it or take it.

Section 8316 of the United States Compiled Statutes (R. S., Sec. 4525), provides, among other things, that no right to wages shall be dependent on the earnings of freight by the vessel.

In *Pitman v. Hooper,* 11 Fed. 185, it was held:

> "Where freight is earned, it is not material that it has not been received by the master or owners."

In the same case it was held that seamen are entitled to wages for the full period of their employment in the ship's service for any particular voyage in which freight is or might be earned by the owner.

Mr. Moran, the port steward, on cross-examination testified as follows:

"Q. You did not know, then, what you were called down to the office of the Shipping Commissioner for, did you?

A. Only just what I have mentioned; he spoke about the payroll and provisions, but, as I say, he did not make any request of me.

Q. Was Captain Renny there at that time?

A. Yes, he was there.

Q. Did he say anything to you at that time?

A. He spoke about provisions; Mr. McArthur wanted me to O. K. the captain's signature to provide for the ship, and I told him I had no authority to do that. He wanted to know if I could procure provisions and I told him I did not have a dollar, nor did I know where I could get a dollar's credit, speaking for myself." * * *

"Q. Did you make any effort to provide provisions for the crew at that time?

A. No." * * *

"Q. Did you do anything at that time or subsequently thereto in reference to providing provisions for the crew?

A. No, because I was of the impression that they were discharged.

Q. What gave you that impression?

A. Mr. Ringwood.

Q. What did Mr. Ringwood say to you?"

* * * *

A. Mr. Ringwood told me not to provide any fore for them; that by the time the provisions that were sent there were consumed the crew would be discharged" (apostles pp. 180, 184).

It is very apparent from the record that Mr. Ringwood, the president of the Pacific Motorship Company, attempted in every manner possible to

clear himself from any responsibility in reference to providing provisions and wages for the crew, even keeping out of the way in order to do so, and refusing to communicate with the Shipping Commissioner.

On cross examination, Mr. Baird, the auditor of the Pacific Motorship Company, testified as follows:

> "Q. Did you have any conversation with Mr. McArthur on that day over the telephone?
> A. No, only after somebody else called me to the 'phone, I spoke in the presence of another party.
> Q. Who was asked for then?
> A. Mr. Ringwood, I believe it was.
> Q. Mr. Ringwood was asked for?
> A. I believe he was.
> Q. What did you say?
> A. I spoke to Mr. Ringwood, and he referred me to Mr. Moran, I believe it was."
> * * * *
>
> "Q. What did you say to Mr. Ringwood?
> A. I just said Mr. McArthur wished to speak to him.
> Q. What did Mr. Ringwood say?
> A. He referred me to Mr. Moran; he wanted Mr. Moran to take the matter up; he had nothing to speak to Mr. McArthur about" apostles pp. 193, 194).

We feel that it is necessary to again refer to the claim of appellants' counsel that libelants demanded more than the court found they were entitled to, because of the continued reiteration of this unjustifiable contention. As we have already said, the

schedule attached to the libel included the amount required for transportation and subsistence. This was necessary for the reason that had the vessel been abandoned by the owners and the other lien claimants allowed to participate, it would have been necessary for the libelants to obtain a decree for an amount covering their wages, together with the amount necessary for transportation, subsistence during transportation and any additional amounts that they were entitled to receive under the shipping articles. Notwithstanding these facts, the appellants claim that the seamen persisted in making excessive claims until after the court had decided definitely that they were groundless. The record does not support appellants' statement. The court in fact found that the seamen were entitled to their wages up to March 17th together with a sum equal to two days for one from the 17th day of March, 1921 to May 17, 1921, and transportation and subsistence en route. As a matter of fact, the statement from which the appellants computed the amount of $5609.20, which was tendered on April 27th by Mr. Gerber was obtained from the payroll furnished by the master to the owners covering also the account of credits for certain advances, and stores drawn by the seamen from the slop chest. This accounts for the apparent discrepancy between $5609.20 and $5551.07.

We submit, that at no time did the appellants make a tender such as was contemplated under the statutes. If there was a controversy as to the

amount of wages due as claimed by appellants, why was the Navy Department authorized by them to pay to the credit of Ira S. Lillick as trustee the amount equal at least to the claim which the libelants made on March 17th, 1921. Had the owner of the motorship "Benowa" made a valid assignment of the freight money or a portion thereof due for the particular voyage in question, to the libelants in this case, would they not have obtained a release from all claims which the libelants may have had against them for wages? As a matter of fact, the libelants were not informed by the Pacific Motorship Company that this freight money was in the hands of the Navy Department, but it was only by mere chance that the facts were ascertained by proctor for libelants. Even after this freight money was released, as appears from appellant's statement, it was paid to Houlder, Weir & Boyd, Inc., not as agents of the Pacific Motorship Company, but as principal upon the contract with the Navy Department.

W. L. Comyn in his testimony claims that he made an assignment of a portion of freight moneys to proctor for libelants and therefore it was not necessary to do anything further on behalf of the crew. It is clearly apparent from the record that Houlder, Weir & Boyd were the principals on the contract of affreightment with the Navy Department and the only ones that the Navy Department would recognize (apostles pp. 457, 458, 459). Therefore the attempted stop order sent to the Navy De-

partment by proctor for libelants and the so-called assignment testified to by Mr. W. L. Comyn was not recognized because as far as the contract was concerned the only firm having any interest therein was Houlder, Weir & Boyd.

On page 41 of appellants' brief they state: "The only reason why libelants did not receive the assigned moneys was that they failed to make the necessary demand for them". In the same breath appellants contend that the Pacific Motorship Company made an assignment (which we deny) of a portion of the freight monies due from the Navy Department. If they had made a good assignment and the money had been released, it was not necessary to make further demand upon the agents of the Pacific Motorship Company, yet they would have this court believe that they did everything in their power to see that the wages of the seamen were promptly paid. Our indignation at the manner in which appellants have discussed the facts as to this assignment is so great, that we refrain from characterizing the motives which must have actuated counsel in expressing themselves as they have. We leave the record as to this matter without further comment. The court is in as good a position as we are to picture the real situation. We submit that the record shows that nothing was done by the Pacific Motorship Company other than to serve its own interests and that a more exaggerated case of abandoning seamen in a foreign port

without subsistence and nonpayment of wages cannot be found in the record of maritime cases.

Counsel claim that libelants should have stated facts in their libel showing that the refusal of payment was without sufficient cause, but no authority is cited upholding this contention. This is a matter of defense, if such can be shown and if the facts for non-payment show that it was without sufficient cause then the court will find accordingly.

On page 44 of counsel's brief they state that the equitable owner, the Pacific Motorship Company, is not a party. However, a verified claim was filed in this case, as appears from the record (apostles p. 46).

Counsel again cited the case of the *General McPherson,* 100 Fed. 860, and state that the court in that case intimated that no penalty could be recovered in a proceeding *in rem.* The court distinctly refused to pass upon that question, but as the point has already been referred to by us we will not discuss it further.

So much stress has been laid upon the point that the other creditors of the vessel would have to bear the burden of the claims of the seamen that we must call attention to the fact that this statute was expressly made for the benefit of the seamen; undoubtedly, because seamen when signing shipping articles have not the means of protecting themselves from being deprived of their wages and stranded in foreign ports, while other creditors of

a vessel or of the owners thereof can secure collateral or other security in case they are in doubt as to the financial ability of the owner to pay its bills. The seamen are wards of the court and look to the court and to the law for their protection. They have not the means of investigating the financial standing of the owners of a vessel, such as mercantile houses have with their credit departments, and various other means of keeping in touch with the financial standing of operators of vessels. As expressed in the case of the *City of Montgomery*, 210 Fed. at pages 675 and 676, in commenting upon this statute:

> "If in the practical conduct of a responsible steamship company such a provision is found inconvenient, or otherwise unsatisfactory, the remedy is by appeal to the legislative body, but the court must construe such a statute not merely by its letter but in sympathy with the legislative intent."

Counsel criticise the decree because it provides that if the transportation and subsistence are not furnished to libelants upon satisfaction of "the foregoing provisions of this decree," that in lieu thereof each of said libelants shall receive the amounts set opposite their respective names. The decree was proper because many of the libelants had homes on the East coast and desired to return to their homes and were forced to borrow money or secure it by other means and thereafter advance the cost of transportation and subsistence en route which they were entitled to receive under

the shipping articles. We submit that it was proper for the court to allow this sum, in view of the fact that the court could not compel them to furnish transportation and subsistence but could decree a certain amount to the libelants in lieu thereof upon their failure to furnish such transportation or subsistence and, also if the libelants were forced to advance their cost of transportation and subsistence prior to the termination of this case, they are entitled to reimbursement.

Another question raised by appellants is that a decree for the sale of the vessel under a junior libel without consolidating it with earlier libels and intervening libels under which the vessel is held by the marshal is irregular. No authority, however, is cited to support this contention. In *Hughes on Admiralty,* 2nd Ed. at page 397, the author states:

> "In many Districts independent libels are filed against the vessel. In some the vessel is arrested under the first libel and the others come in by petition. In some Districts after a certain time all the claims are referred to a commissioner to ascertain and report their relative rank. In others, in the event of no contest, a decree is entered at the return date or as soon thereafter as possible, giving petitioners a judgment against the vessel and directing a sale. It is impossible to lay down any rule on the subject."

We submit that it has been the practice in this District to file independent libels and in fact this contention is supported by Admiralty Rule 25 of this District:

> "Where the res remains in the custody of the marshal the cause will not be heard until after publication of process shall have been made in the cause, or in some other pending cause in which also the property is held in custody, but no final decree shall be entered ordering the condemnation or sale of property not perishable arrested under the process in rem unless publication of process in that cause shall have been duly made." * * *

Rule 40 of the Admiralty rules of the Supreme Court of the United States is as follows:

> "All sales of property under any decree of Admiralty shall be made by a marshal or his deputy, or through proper officer assigned by the court, where the marshal is a party in interest in pursuance of the order of the court and the proceeds thereof, when sold, shall be forthwith paid into the registry of the court by the officer making the sale to be disposed of by the court according to law."

This claim of appellants is dispensed with by reason of a bond having been filed as hereinbefore mentioned. This contention was made in the court below and, on the 16th day of May, 1921, upon the suggestion of Thatcher & Wright, the matter was reassigned for argument on the 17th of May, at which time Judge Neterer requested that counsel for libelants notify all other libelants that this matter would be argued at that time. The court then requested proctor for libelants to notify the other claimants of the hearing, which was done and the only attorneys appearing outside of the attorneys of record in this case were Thatcher &

Wright representing various lien claimants and the court found that the contentions which libelants are here making were unsound and that it is the practice in this District to either commence independent libels or intervene in the original libel.

Counsel claim that we have delayed this case, and yet in all cases commenced for other lien claimants in which the docket appears in the record, not one of the cases is at issue, nor has an answer been filed therein. The main reason for commencing an independent libel was to assure a speedy determination in this case and not be delayed by reason of other claims in which there was no dire necessity for a speedy determination.

In conclusion, we desire to state that the record clearly upholds the contention of libelants that proper demand was made by them for wages in compliance with sections 4529 and 4530 of the Revised Statutes.

The vessel arrived at the port of San Francisco on February 28th, 1921, and, upon its arrival, demand was made by the crew upon the master for one-half of the wages due them, and this was refused by reason of the fact that the master had no funds belonging to the company. Thereupon he notified the office of the company of the demand, and thereafter, continual demands were made by the crew upon the master while this vessel was in port, both previous to the time that arrangements were made for the discharge of the cargo at California City and subsequent thereto (apostles 119, 120, 168, 169).

We submit that the findings of fact expressed in the opinion of the Judge in the lower court under the facts and law appertaining to this case are correct and that the decree entered therein should be affirmed.

Dated, San Francisco,
October 19, 1921.

Respectfully submitted,

IRA S. LILLICK,
Proctor for Appellees.

J. ARTHUR OLSON,
Of Counsel.